

On May 21, 2001, claimant testified she was upstairs in respondent's office, moving a large bag of Beanie Babies away from the door because she was fearful that they would be stolen. Claimant somehow managed to twist her ankle and fall, suffering a stress fracture to her right calcaneus and cuboid region. Claimant was treated by Michael P. Estivo, D.O., and returned to work with light duty restrictions of sedentary work only.

Claimant continued working sedentary work, which primarily consisted of working the cash register, until July 2, 2001. At that time, she was advised by her boss, Joseph Underwood, that she would not be working at the cash register anymore. Claimant testified she quit her employment at that time because she was physically incapable of working the other jobs which required substantial standing.

Respondent contends claimant quit the job because she was taken off the cash register. Respondent has also made allegations that its cash register total was short several thousand dollars during the period claimant was running the register. Respondent further alleged that claimant had been drinking on the job.

Respondent owner Joseph Underwood testified that there was no reason for claimant to be upstairs on the second floor, which is where the bag of Beanie Babies was located. He went on to state that there was also no reason for claimant to ever be in his office, which is, according to claimant's testimony, the vicinity where the accident occurred. Claimant, however, described this as a storage area rather than an office area.

Prior to working for respondent, claimant had been convicted of theft and was currently incarcerated for a drug violation. Respondent denied ever being told that claimant had a prior theft conviction. Cynthia Bossemeyer, claimant's counselor with the Department of Corrections, testified that, when claimant obtained the job with respondent, respondent did not ask about her prior convictions.

The allegations between claimant and respondent are numerous. Both attempt to implicate the other in numerous falsehoods. Claimant alleges she was upstairs, near respondent's office, for a legitimate business purpose, i.e., withdrawing cash from the safe. This testimony was never directly contradicted by respondent.

The evidence is also contradictory regarding the events leading up to claimant's departure from respondent on July 2, 2001. Likewise, there is contradictory evidence regarding what sedentary employment respondent offered claimant and whether this ongoing sedentary employment opportunity had been withdrawn.

In this instance, the Administrative Law Judge had the opportunity to view all of the testimony live. The Appeals Board has held in the past and continues to hold that, in certain instances, an administrative law judge's opinion of witness credibility should be given deference as that administrative law judge does have the opportunity, while viewing live testimony, to assess the demeanor of the various witnesses. In this instance, as the Administrative Law Judge awarded claimant benefits, the Administrative Law Judge apparently found claimant's testimony to be more credible than that of Mr. Underwood. The Appeals Board finds that, by the slimmest of margins, claimant has proven for preliminary hearing purposes that she suffered accidental injury arising out of and in the course of her employment with respondent.

As the evidence is very contradictory and as this matter is subject to a full review at the time of regular hearing, the Appeals Board anticipates additional evidence will be provided by the parties to clarify some of the ongoing contradictions.

Respondent also claims that the payment of compensation in the form of temporary total disability compensation is inappropriate in this instance. As has been held many times in the past, K.S.A. 44-551 and K.S.A. 44-534a limit the Appeals Board's authority to review appeals from preliminary hearings. K.S.A. 44-534a specifically allows an administrative law judge the authority to decide issues dealing with an award of temporary total disability compensation. The statutes do not allow the Appeals Board the jurisdiction to review this issue when on appeal from a preliminary hearing. The Appeals Board, therefore, dismisses respondent's appeal regarding the award of temporary total disability compensation.

The Appeals Board, therefore, finds that the Order of the Administrative Law Judge should be affirmed with regard to whether claimant suffered accidental injury arising out of and in the course of her employment. The issue dealing with the award of temporary total disability compensation is dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated September 10, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2001.

BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director